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No. 86-189

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In the Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE F. METZ AND INGRID METZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners George and Ingrid Metz contend that the United States is liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for alleged invasion of privacy and intentional infliction of emotional distress resulting from the arrest and detention of George Metz, a federal employee, at the request of his supervisors.[1]

1.a. George Metz was a driving instructor at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, until his discharge in November 1982.[2] Metz contends in his complaint that he was deliberately passed over

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[1]An issue similar to that presented here is raised in the petition for certiorari filed in *Johnson* v. *United States*, No. 86-114 (filed July 11, 1986), an FTCA action alleging that the Postal Service was negligent in employing and supervising a mailman who sexually assaulted a five-year-old girl.

[2]The FLETC is a unit of the Department of Treasury.

for promotions between 1977 and 1979 in favor of less qualified candidates. During that period, Metz complained to his fellow employees that FLETC administrators had engaged in misconduct. Metz alleges that, in response, his supervisors initiated a conspiracy against him. He claims that as a result of this alleged conspiracy, his job performance was downgraded from "outstanding" to "excellent," which prompted him to become even more uncomplimentary about his supervisors in conversations with other employees. In August 1982, Metz and his immediate supervisor, James Lanier, met to discuss Metz's continued complaints. David Epstein and Robert McCann, two other FLETC supervisors, were also present. Metz voiced his frustrations and concerns about his treatment by his supervisors. After this meeting, Metz, a Marine Corps reservist, left to report for active duty at Columbia, South Carolina. Pet. 4-5; Pet. App. A2-A3, A19-A20.

Metz' supervisors, concluding that Metz presented a threat to their personal safety, took the following steps: On the evening of August 3, 1982, David McKinley, then acting director of FLETC, and George Graves, another supervisor, contacted Metz' priest and asked him to accompany them to the Metz residence to help locate Metz and to speak with Metz' wife. Mrs. Metz told them that Metz was on his way to South Carolina. The next morning, Metz' supervisors obtained a warrant for the arrest of Metz on charges of "terroristic threats," a felony in Georgia, and informed the Marine Corps of the warrant. Marine Corps personnel, in response, detained Metz shortly after he arrived at the South Carolina military base and searched his car. Metz was later taken to a nearby Army mental hospital for psychiatric evaluation, where he was allegedly held for two days, after which he returned to his reservist duty. The FLETC later required Metz to undergo examination by a civilian psychiatrist, who pronounced him normal. The

FLETC nevertheless terminated his employment based on the threats that he allegedly made to his supervisors. Pet. App. A3-A4, A20-A22.

b. Metz contested his discharge through federal administrative proceedings, and was ultimately successful.[3] He and his wife also brought a *Bivens* action against various members of the FLETC, which was dismissed for failure to state a claim upon which relief could be granted.[4] Finally, they filed this FTCA action against the United States, seeking $18 million in damages, in the United States District Court for the Southern District of Georgia. They alleged that federal officials falsely arrested and imprisoned Mr. Metz and subjected him and his wife to invasion of privacy and intentional infliction of emotional distress. Pet. App. A4-A5.

The district court concluded (Pet. App. A40) that petitioners' claims against the United States "cannot be maintained in light of *Feres* v. *United States* [340 U.S. 135 (1950)[5]], the intentional tort exception of the FTCA, 28 U.S.C. 2680(h), and the law of privacy in Georgia." The court of appeals affirmed (Pet. App. A1-A17), holding that

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[3]The presiding official of the Merit Systems Protection Board (MSPB) Regional Office concluded that Metz' statements were non-threatening but inappropriate and imposed a mitigated penalty of 30-days' suspension. The MSPB reversed that decision, holding that Metz had threatened his supervisors. *Metz* v. *Dep't of the Treasury*, 23 M.S.P.R. 576 (1984). The Federal Circuit reversed the MSPB's determination, concluding that the evidence of threats was insufficient to warrant dismissal. *Metz* v. *Dep't of the Treasury*, 780 F.2d 1001 (1986).

[4]See *Metz* v. *McKinley*, 583 F. Supp. 683 (S.D. Ga. 1984), aff'd mem., 747 F.2d 709 (11th Cir. 1984).

[5]*Feres* held that the FTCA does not extend a remedy "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (340 U.S. at 146).

all of petitioners' claims arose out of intentional torts for which Congress has retained sovereign immunity.[6]

The court of appeals first concluded (Pet. App. A5-A7) that the FTCA's waiver of immunity for false arrest and false imprisonment by federal law enforcement officers (28 U.S.C. 2680(h)) did not apply because the FLETC and Treasury officials involved here are not law enforcement personnel.[7] The court specifically stated that "the provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers" (Pet. App. A7, citing *Arnsberg* v. *United States*, 757 F.2d 971, 977-978 (9th Cir. 1985), cert. denied, No. 85-596, Feb. 24, 1986)).

The court of appeals next held (Pet. App. A8-A17) that petitioners' remaining claims, based on tort theories of invasion of privacy and intentional infliction of emotional distress, are non-actionable under Section 2680(h) of the FTCA because allegations of false arrest and slander—excepted causes of action under Section 2680(h)—are "essential" to establishing plaintiff's claims (Pet. App. A8-A17). The court agreed (Pet. App. A9-A10) with the reasoning of Chief Justice Burger in *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 2-4, that the plain language

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[6]The court of appeals did not address the *Feres* issue because petitioners had abandoned any claim based on the culpability of the Marine Corps or its personnel (Pet. App. A5 n.1). The court of appeals also found it unnecessary to decide the state law questions, stating that the district court should have referred to traditional and commonly understood tort definitions, rather than to the law of Georgia (*id.* at A14 n.8).

[7]The district court had held that the FLETC and Treasury Department officials were not themselves "investigative or other law enforcement officers," and petitioners did not argue to the contrary on appeal (Pet. App. A7 n.2).

of Section 2680(h) preserves sovereign immunity in the case of actions "arising out of" certain intentional torts (such as false arrest and slander) and therefore prohibits claimants from clothing actions for those torts in the garb of other potentially actionable torts.[8] The court observed (Pet. App. A10-A11) that this Court's decision in *Kosak* v. *United States*, 465 U.S. 848 (1984), indicates that the phrase "arising out of" in the FTCA should be broadly construed. Most helpful, the court of appeals concluded (Pet. App. A11), was this Court's decision in *Block* v. *Neal*, 460 U.S. 289 (1983). In that case the Court rejected the government's contention that a claim was barred by the misrepresentation exception of Section 2680(h) since in that case "the misstatements are not essential to plaintiff's negligence claim" (460 U.S. at 297). The court of appeals concluded from these three decisions that "a cause of action which is distinct from one of those excepted under 2680(h) will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiff's claim" (Pet. App. A12).

Applying this test, the court of appeals analyzed plaintiffs' invasion of privacy and intentional infliction of emotional distress claims in three groups. First, it noted that "the government's actions that constitute a claim for false arrest are essential to Mr. Metz's claims for intentional infliction of emotional distress and intrusion into seclusion. There is no other government conduct upon which such claims can rest." Pet. App. A14. Second, as to Mr. Metz'

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[8]Justices White, Rehnquist, and O'Connor joined in Chief Justice Burger's opinion. Justice Brennan, joined by Justices Blackmun and Stevens, declined to concur in the portion of the opinion addressing 28 U.S.C. 2680(h) but concurred in the judgment. Justice Marshall concurred in the judgment and Justice Powell did not participate in the decision of the case.

false light claim and Mrs. Metz' intentional infliction of emotional distress claim, it concluded that the wrongs complained of in both instances were governmental statements constituting slander, which is among the torts enumerated in Section 2680(h) (Pet. App. A15). Finally, it reached the same conclusion with regard to Mrs. Metz' allegation that her seclusion was violated when the defendants came to her house and secured admission by making false assertions about her husband (Pet. App. A16-A17).

2. Petitioners broadly argue (Pet. 9-11) that the FTCA authorizes tort actions against the United States for invasion of privacy and intentional infliction of mental distress. But the actual (and much more narrow) question presented by this case is whether the FTCA permits such actions when they "arise out of" intentional torts specified in Section 2680(h). The court of appeals correctly recognized that essential to the actions petitioners allege are claims for false arrest and slander, barred by Section 2680(h), which petitioners have simply recast as claims for invasion of privacy and intentional infliction of emotional distress. And the court properly concluded that Section 2680(h) should bar those claims. That decision does not warrant further review.

a. The FTCA generally "does not apply" to various intentional torts, including "[a]ny claim arising out of * * * false imprisonment, false arrest * * * [or] slander" (28 U.S.C. 2680(h)).[9] Petitioners' claims here "arise out of" those specifically listed torts and are therefore barred. Their claims rest wholly on allegations that federal officials made false statements concerning Mr. Metz and subjected him to false arrest. As the court of appeals explained (Pet. App. A14, A15), claims for slander and false arrest are essential

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[9]The FTCA does permit false imprisonment and false arrest claims against law enforcement officers. See 28 U.S.C. 2680(h).

to petitioner's claims because "[t]here is no other government action upon which these claims could rest."

This Court addressed an analogous situation in *Shearer*. An FTCA plaintiff attempted to characterize a serviceman's battery of another serviceman as an instance of negligent government supervision. Chief Justice Burger, writing for a plurality of four Justices, explained the controlling principle (slip op. 3, (emphasis in original)): "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee." We believe that the reasoning of the plurality is persuasive and plainly supports the court of appeals' decision in this case. See also *Kosak*, 465 U.S. at 853-854. The petitioners here, like the respondent in *Shearer*, have simply utilized a "semantical recasting of events" (slip op. 2) to avoid Section 2680(h)'s limitations. If petitioners' approach were to prevail, Section 2680's limitations could *always* be circumvented in any case based on false arrest or slander by recharacterizing the claims as claims for invasion of privacy or intentional infliction of emotional distress.

b. Petitioners cite (Pet. 3, 9) two court of appeals cases, *Gross* v. *United States*, 676 F.2d 295, 303-304 (8th Cir. 1982), and *Black* v. *Sheraton Corp.*, 564 F.2d 531, 539-541 (D.C. Cir. 1977), as conflicting with the decision below.[10]

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[10]Petitioners also cite (Pet. 9) *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), as conflicting with the decision here. However, while the court in that case held that an invasion of privacy claim was not barred by Section 2680(h) (588 F.2d at 328), the court did not explain the basis for the government's contention that Section 2680(h) barred the claim. Moreover, we do not see how the underlying government conduct—covertly opening mail sent to and received from the Soviet Union—could be said to constitute a claim listed in Section 2680(h) from which the plaintiff's invasion of privacy claim arose. Accordingly, there is no conflict between the decision here and the decision in *Birnbaum*.

Those cases were decided before this Court's recent decisions illuminating the meaning of Section 2680(h). As the court of appeals noted (Pet. App. A9 n.3), neither case squarely discussed the significance of Section 2680(h)'s "arising out of" language. Furthermore, it is unclear from the court's discussion in each case whether allegations constituting excepted causes of action in Section 2680(h) are, as here, essential to the pursuit of the claims in dispute. The governmental conduct underlying the claim in *Black*—bugging the plaintiff's hotel room (564 F.2d at 534)—does not appear to constitute a claim barred by Section 2680(h). Thus the District of Columbia Circuit's decision in that case does not appear to be in conflict with the decision here.[11] It is not at all clear whether the underlying governmental conduct in *Gross*—denial of permission to participate in a feed grain program—constituted a claim barred by Section 2680(h), although the dissent in that case thought that the plaintiff would be required to show "an invasion of rights closely analogous to those invasions of rights listed in Section 2680(h)" (676 F.2d at 305) to prevail on his infliction of emotional distress claim. Since that case was decided before this Court's decisions in *Shearer*, *Kosak*, and *Block* v. *Neal*, the court did not consider whether the underlying governmental conduct out of which the plaintiff's action arose actually constituted a claim barred by Section 2680(h). Petitioner does not suggest that the underlying governmental conduct in *Gross* constituted a claim barred by Section 2680(h), instead alleging a conflict simply on the basis that the court permitted the plaintiff to go forward

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[11]The District of Columbia Circuit recently held in *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1153-1156 (1985), that claims alleging interference with prospective business advantage and injurious falsehood arose out of wrongful interference with contract rights and libel or slander and hence were barred by Section 2680(h), confirming that the approach taken by that circuit is consistent with the approach taken here.

with an intentional infliction of emotional distress claim in *Gross* while the court held that such a claim was barred under the facts of this case. Under these circumstances, there is no clear conflict warranting this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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